as to whether the Act of 1906, p. 139, § 28, would prevent such statement from being a warranty.

This statute, which now appears in Pollard's Supplement to the Code (1910) as § 28 of the act concerning insurance companies (p. 602), and appears to take the place of § 3344a, only applies where the misrepresentation is not material, as held in the principal case, and does not relieve from the forfeiture consequent upon a false statement such as that made in the principal case.

The decision as to the nonapplication of the statute referred to is borne out fully by Van Cleave *v.* Union, etc., Co., 82 Mo. App. 668, where it is held, under the Missouri statute providing that no misrepresentation in obtaining a policy of insurance on the life of any person shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or the event on which the policy is to become due and payable, that, where the parties by their contract agreed that the statements in the application for insurance should constitute warranties, a statement that the beneficiary named in the policy was the wife of the insured, when she was in fact his mistress, avoided the policy, and § 5849 had no application, since the representation was fraudulent, and made with an intention to deceive, and was made material to the risk by the agreement of the parties. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

Of course these principles would be equally as applicable to an ordinary life policy as to an accident policy like the one in the principal case.

As to the failure to give notice of loss within the specified time, there is a rather peculiar case, in which it was held that failure to give immediate notice of an accident to an employers' liability insurance company, was not excused by want of knowledge of the policy by one of two mine operators for whose benefit the insurance was taken by the other, and want of knowledge of the accident by the latter. The court said that this condition of affairs was brought about solely by the neglect of one of the insured to notify the other of the contract. Deer Trail, etc., Co. *v.* Maryland Casualty Co. (Wash.), 67 L. R. A. 275.

The decision is an important one, and undoubtedly correct, and will no doubt be welcomed by the insurance companies, as there have not been many precedents on these points.

J. F. M.

IRVINE *v.* RANDOLPH LUMBER CORPORATION et al.

Nov. 17, 1910.

[69 S. E. 350.]

1. Courts (§ 157*)—Court of General Jurisdiction.—The circuit court of the city of Richmond is a court of general jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 157.*]

2. Judgment (§ 516*)—Jurisdiction—Collateral Attack.—A creditor

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

of a corporation, who was also a director of the corporation, recovered, in a suit upon accommodation notes, indorsed by him for the corporation, in the circuit court of the city of Richmond, upon a judgment by confession of the president of the corporation. Another judgment creditor afterwards brought a bill in equity against the corporation, its president, the first judgment creditor, and others, charging that such director had fraudulently delayed complainant's remedy by his assurance that the complainant would be taken care of, and by other acts set out in the bill, and prayed that the first judgment might be subordinated to complainant's judgment, and that complainant's judgment might be paid in full before any satisfaction of the earlier judgment. These allegations were partly denied and partly admitted. Held that, the circuit court having had jurisdiction of the subject-matter and the parties in the judgment by confession, its judgment could not be collaterally attacked.

[Ed Note.—For other cases, see Judgment, Cent. Dig. § 958; Dec. Dig. § 516.*]

3. Judgment (§ 470*)—Subject-Matter—Collateral Attack.—Where jurisdiction exists, an order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or anything done by virtue of its authority.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

4. Judgment (§ 505*)—Collateral Attack—Judgment by Confession—Power to Confess.—Where the president of a corporation appears and confesses judgment in an action against a corporation, the court before which the action is pending must consider his authority to confess judgment, and the court's judgment as to the right and authority of a person so appearing to bind the corporation must be conclusive against collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 948; Dec. Dig. § 505.*]

5. Judgment (§ 792*)—Priority Between Judgments—Action—Evidence.—Evidence, in a suit in equity by a judgment creditor of a corporation to have his judgment declared prior to a judgment obtained by confession in favor of a director of the corporation, on the ground that he had been fraudulently prevented from obtaining his judgment at an earlier date, held not sufficient to warrant a judgment for complainant.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 792.*]

Appeal from Circuit Court, of Albemarle County.

Bill in equity filed by James E. Irvine against the Randolph

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Lumber Corporation, E. D. Hotchkiss, Jr., and others, to set aside a judgment against the corporation in favor of defendant Hotchkiss. From a judgment for defendants, plaintiff appeals. Affirmed.

KEITH, P. The appellant filed a bill in the circuit court of Albemarle county in which he states his case as follows: The Randolph Lumber Corporation is the owner of a parcel of land containing about four acres, subject to a deed of trust for $600 due F. H. Via. This company was indebted to James E. Irvine in the sum of $1,093.07, subject to certain credits, so that, as the bill avers, the actual amount due the appellant was much less than appeared to be due by his books. He urged a settlement with the corporation, and insisted that a statement should be given him in order that he might ascertain the exact status of the account between them. This he was unable to obtain, and he thereupon proceeded to secure a judgment in the circuit court of Albemarle county, at the October term, 1908, for the whole amount of his demand, $1,093.07, with interest from the 1st of July, 1908, and his costs, and this judgment was docketed on October 17, 1908. On the 12th of September, 1908, E. D. Hotchkiss, Jr., who was a creditor of the lumber corporation, brought his suit in the circuit court of the city of Richmond against the lumber corporation, and its president, W. S. P. Mayo, appeared and confessed judgment in that suit in favor of the plaintiff for the sum of $1,933.03, with interest at the rate of 6 per cent. per annum on $877.24 part thereof from the 19th day of October, 1907, and on $926.55, the residue thereof, from the 3d day of July, 1908, until payment, and the costs. The prayer of the appellant is that the judgment in favor of Hotchkiss was a fraud upon him; that late in the summer of 1908, or early in the fall of that year, he was urging a settlement of his claim by the lumber corporation; and that he was requested by E. D. Hotchkiss, Jr., not to do anything at all looking to the collection of his claim, and in order to induce the appellant to accede to his request Hotchkiss assured him that "he would be taken care of, the protection thus promised being that of E. D. Hotchkiss, Jr., as well as that of the Randolph Lumber Corporation, of which the said Hotchkiss was a prominent member, and in whose interest he was acting;" that "replying upon this assurance, and depending upon this protection, complainant remained quiet and took no steps for the security of his debt, and some ten days or two weeks after said assurance had been given, complainant learned to his surprise that a judgment had been obtained on the 12th of September, 1908, in the

chancery court of the city of Richmond, by E. D. Hotchkiss, Jr., against the Randolph Lumber Corporation for nearly $2,000." This judgment the appellant asserts is not valid as against the judgment in his favor, and he states the grounds of his contention as follows:

"First. Because he was prevented from getting judgment before the date of said confessed judgment by the assurance of protection made him as aforesaid, and on which he confidently relied; because of the trust he reposed in said E. D. Hotchkiss, Jr., by whom the promise of protection was solemnly made. To hold that this confessed judgment is, under such circumstances, good as against complainant's debt will in effect be to consummate the perpetration of a fraud.

"Second. Because said confessed judgment was not docketed here at all, and whatever may be the result of nondocketing of judgments as between other judgment creditors, in this case the failure to docket was equivalent to failure to notify, because in fact at the very time said judgment was confessed complainant was being held in security upon the faith of a promise that nothing would be done to his detriment.

"Third. Because the president of the Randolph Lumber Corporation, who confessed this judgment for E. D. Hotchkiss, Jr., had no authority to make such confession."

The bill further charges that after the complainant had recovered his judgment an opportunity arose of selling the property for a sum sufficient to pay the Hotchkiss judgment and his own and other debts for which the corporation was bound; that the price available was $4,000, which the complainant considered a most fortunate opportunity for paying the debts of the corporation, including his own, and would relieve all trouble concerning the broken promise and put the company firmly upon its feet; that he went to Richmond at his own charges and had a full conference with Messrs. E. D. Hotchkiss, Jr., Julien Gunn, and W. S. P. Mayo, informing them of the possibility of a sale and urging its conclusion; that the parties refused to consider the proposition, but said they would consent to a sale at $5,000; that in this way complainant was deprived of his debt for the second time; that on the occasion of this conference complainant distinctly reminded Hotchkiss of the promise he had made to protect complainant so far as his debt was concerned, and this reminder was made in the presence of W. S. P. Mayo and Julien Gunn; that Hotchkiss admitted that he had made the promise as claimed, but said he had forgotten it; that in this situation of affairs the creditor secured by the trust deed, whose debt was due and unpaid, directed sale under his deed, and the trustee, Micajah Woods, advertised and offered the property

for sale on the 1st of May, 1909; and that it was sold and Hotchkiss became the purchaser at the price of $1,760. The bill then prays that the Randolph Lumber Corporation, E. D. Hotchkiss, Jr., F. H. Via, Micajah Woods, trustee, W. S. P. Mayo, and Julien Gunn be made parties defendant to the bill; that the judgment in favor of Hotchkiss against the lumber corporation may be subordinated to complainant's judgment and the latter paid in full before the former is recognized; that if need be in the further progress of the cause an injunction may be awarded requiring the retention of the fund involved until complainant's rights are fully and finally determined; and for other and further relief.

The answer of Hotchkiss admits that he is a director of the corporation known as the Randolph Lumber Corporation; that the corporation was the owner of the land bought from the Wood Manufacturing Company, as set forth in the bill; that the land was subject to a deed of trust for $600. But the respondent denies that the Randolph Lumber Corporation was indebted to the plaintiff in any such sum as he claims, but avers that, if the said company is indebted to the plaintiff at all, it is for a small amount, possibly not exceeding $200. Respondent admits that he obtained a judgment against the Randolph Lumber Corporation for nearly $2,000 in the circuit court of the city of Richmond, which indebtedness was for notes indorsed by respondent as an accommodation for the said company, and which he had been obliged to pay, and which he now holds. Respondent denies that he in any way prevented the plaintiff from getting a judgment against the Randolph Lumber Corporation, or that he endeavored to in any way lull him into fancied security as to his alleged debt, or that he has in any manner deprived him of any legal rights to which he was at any time entitled, or which he was at any time able to assert. The answer further alleges that the president of the lumber corporation did have authority to confess judgment, but, even if this were not true, that the validity of the judgment cannot be attacked collaterally. The respondent further denies that he has at any time been aware of the possibility of disposing of the assets of the Randolph Lumber Corporation at a price which would have relieved it of its debts, as set forth in the bill, and that he had admitted to the plaintiff that he had made any promise to hold him harmless, but said he had forgotten it. He admits that he did purchase at public auction the property described in the bill at the price of $1,760, and that prior to the sale of the property he bought from F. H. Via the debt secured by deed of trust, and that he is entitled to be reimbursed in this behalf.

We are of opinion that the circuit court of the city of Rich-

mond is a court of general jurisdiction; that, with respect to the judgment complained of, it had jurisdiction both of the subject-matter and of the parties; and that its judgment cannot be collaterally assailed.

In Van Fleet on Collateral Attack it is said, at section 17, that, "jurisdiction existing, any order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title through it, or anything done by virtue of its authority."

The specific objection to the validity of this judgment is that it was rendered upon confession by the president of the Randolph Lumber Corporation, and that the president, as such, had no power to confess judgment.

A partner, as such, has no power to confess judgment; but, when a judgment so confessed is attacked collaterally, it is not void if it can be upheld under any possible circumstances of law or fact. Van Fleet on Collateral Attack, § 429.

"Upon a confession of judgment by a corporation, the court in which the action is pending must of necessity judge of the authority of any person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question." White v. Crow (C. C.) 17 Fed. 98, cited approvingly by Van Fleet, § 430; Robinett v. Michaux, 101 Va. 762, 45 S. E. 287, 99 Am. St. Rep. 928, and cases there cited.

It may be conceded that this judgment might with propriety have been attacked as having been procured by fraud. Let it also be conceded that the fraud in this case was sufficiently pleaded; yet we think it plainly appears that the proof is altogether insufficient to warrant the relief sought by the complainant. His claim is that E. D. Hotchkiss, Jr., requested him to do nothing looking to the collection of his debt, and assured him that he (complainant) "would be taken care of," and that in this offer of protection Hotchkiss was speaking not only for himself, but for the lumber corporation of which he was a prominent member. It nowhere appears that Hotchkiss had any power to bind the Randolph Lumber Corporation by any promise he might make. Assuming, as stated, that he gave the assurance in the terms in which it is stated in the bill—that complainant would be taken care of—the evidence shows that Hotchkiss thought, and that the appellant knew, Hotchkiss considered, that the debt due by the Randolph Lumber Corporation to Irvine amounted to only $100 or $200, and the bill admits

that the sum actually due to the appellant is less than the face of the judgment.

It further appears, in our judgment, that appellant was not hindered or delayed in procuring his udgment by any assurance or promise made by Hotchkiss to him. What occurred between appellant and Hotchkiss took place the last of August or the first of September, and the suit by appellant against the lumber company was instituted in September and judgment rendered at the next ensuing term of the circuit court of Albemarle county.

In no view that we have been able to take of the case have we discovered any merit in the plaintiff's contention, and we are therefore of opinion that there was no error in the decree of the circuit court.

Affirmed.

Note.

General Power of Corporate Agents to Confess Judgment.—Morawetz lays down the broad rule that the managing agents of a corporation have authority to confess judgment whenever they deem it to be to the interest of the corporation. Mor. Priv. Corp., § 430.

Black, in his recent work on Judgments, discusses the power of agents of a corporation to confess a judgment, but does not even intimate that to confess a judgment is ultra vires of a corporation. Indeed, while he does not in terms assert that power to exist, yet the inference is necessary from his statement that the corporation is bound by a confession of a judgment by its officer upon whom summons might have been served in a contested action. I Black, Judgm., § 59; and see Freem. Judgm., § 545, cited in Shute *v.* Keyser (Ariz.), 29 Pac. Rep. 386, 389.

Power of President.—But it is plain, both upon principle and from the authorities, that the president of a corporation has not, as a matter of law and simply by virtue of his office as president, authority to either confess a judgment against such corporation or execute a warrant of attorney empowering another so to do. Such matters form no part of the ordinary business of the company which the president, as its executive officer, is authorized to transact virtute officii. The power in question is not inherent in or incident to the office from either usage or necessity. Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237; Thew *v.* Porcelain Mfg. Co., 5 South Car. (N. S.) 415; Freeman *v.* Plaindealer Co., 9 Luz. Leg. Reg. 37; McMurray *v.* Oil Co., 33 Mo. 377; Joliet Electric Light, etc., Co. *v.* Ingalls, 23 Ill. Appellate Ct. Rep. 45, 50; J. W. Butler Paper Co. *v.* Robbins, 151 Ill. 588, 38 N. E. 153; Lemars Shoe Co. *v.* Lemars Shoe Mfg. Co., 89 Ill. App. 245; P. P. Mast Buggy Co. *v.* Litchfield Furniture, etc., Co., 55 Ill. App. 98; Adams *v.* Cross Wood Printing Co., 27 Ill. App. 313; Mallory *v.* Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205; Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cit. Ct. 783.

Therefore, the execution by the president of a corporation after it has ceased to do business, of a power of attorney to confess a judgment against it upon an obligation made by him, is not within the scope of his authority. Lemars Shoe Co. *v.* Lemars Shoe Mfg. Co., 89 Ill. Appellate Ct. Rep. 245.

In order for the president of a corporation to confess judgment for

such corporation, it must be done by the order of or with the knowledge of the directors of the company, and the cause of the indebtedness must be set forth, else it is void. McMurray *v.* St. Louis Oil Mfg. Co., 33 Mo. 377; Chamberlin *v.* Mammoth Min. Co., 20 Mo. 96; Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237.

Or as some cases have expressed it, he can only exercise such power when it has been given in express terms by the board of directors. Adams *v.* Cross Wood Printing Co., 27 Ill. App. 313.

That the president of a corporation is the owner of nearly all its capital stock, and is its superintendent and treasurer and the active manager of its affairs, and was accustomed to borrow money for the company's use, will give him no power to encumber its property by a mortgage or judgment confessed for money borrowed. Stokes *v.* New Jersey Pottery Co., 17 Vr. 237.

But while the president of a corporation has no authority to execute a power of attorney authorizing the confession of a judgment against it, yet where suit is regularly brought against the corporation and service duly had upon it, if the claim is just and the corporation has no defense, it is not the duty of the president to deny its justness or to defend the same. Boston Tailoring House *v.* Fisher, 59 Ill. Appellate Ct. Rep. 400.

But a contrary rule seems to obtain in some jurisdictions, in which the power of the president to confess judgment is apparently sustained.

In Chamberlain *v.* Mammoth Mining Co., 20 Mo. 96, it was held that the president of a corporation, being the person appointed by law to defend it, was competent, suit having been brought, to appear and confess the action. The court said: "He might have suffered a judgment by default, and the matter is not made worse by an appearance and confession." Cited in Boston Tailoring House *v.* Fisher, 59 Ill. Appellate Ct. Rep. 400, 404.

In Miller *v.* Bank, 2 Or. 291, wherein a judgment by confession against a corporation was under discussion, the question was whether the president had virtute officii the power to confess for his principal; that the confession was ultra vires the corporation was not even suggested.

In McMurray *v.* Manufacturing Co., 33 Mo. 377, the questions were as to the power, virtute officii, of the president of a corporation to confess judgment, the sufficiency of the statutory statement required to accompany such confession, and the power of the corporation to create a lien by such a judgment, the statute prohibiting it from mortgaging their property or giving any lien thereon. In Joliet, etc., Co. *v.* Ingall, 23 Ill. App. 45, a judgment against a corporation by confession was under consideration. The question whether the corporation had the power to confess a judgment was not suggested. The matter considered was the authority of the particular officer who did confess the judgment to do so. And so in Stokes *v.* Pottery Co., 46 N. J. Law, 237; Thew *v.* Manufacturing Co., 5 S. C. 415; White *v.* Crow, 17 Fed. Rep. 98. And in all these cases there was a direct attack upon the judgment, and not a collateral one, as in this case.

Foreign Corporations.—Incident to the right to sue, and the liability to be sued, a foreign corporation unquestionably has the right to confess judgment. "In no case to which our attention has been called has the power of a corporation to confess judgment been doubted or called in question." Shute *v.* Keksey (Ariz.), 29 Pac. Rep. 386, 389.

Force and Effect of Judgment.—Where a power of attorney to confess a judgment is executed by the president of a corporation without authority, a judgment confessed upon it is void and not merely voidable, Lemars Shoe Co. *v.* Lemars Shoe Mfg. Co., 89 Ill. Appellate Ct. Rep. 245, and, contrary to the ruling in the principal case, may be collaterally attacked on that ground alone. Adams *v.* Cross Wood Printing Co., 27 Ill. App. 313.

The bill in the principal case clearly alleges that no authority was ever conferred on the president to confess judgment, and while this allegation of the bill is denied in the answer, yet the court adds that even if the president of the corporation did not have such power, "the validity of the judgment cannot be attacked collaterally." But serious doubt may be entertained as to the correctness of this statement. In Adams *v.* Cross Wood Printing Co., 27 Ill. Appellate Ct. Rep. 318, the court in speaking of such a judgment said: "The judgments, then, were entered without authority of law, and were not binding on the corporation or its property. They were **void** and the executions issued upon them were also void, and being so void, **not merely irregular or voidable,** they may be assailed by any person and treated as of no force so far as they affect such person's interest."

The Warrant of Attorney.—It seems that warrants of attorney to corporate officers to confess judgments against the corporation need not be under seal in order to be valid. Snyder Bros. *v.* Bailey, 165 Ill. 447, 46 N. E. 452. Compare Adams *v.* Cross Wood Printing Co., 27 Ill. App. 313.

But it is always best that the warrant of attorney be sealed with the common seal. See Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237; Parker *v.* Washoe Mfg. Co., 49 N. J. L. 465.

A judgment confessed by the president of a corporation before the clerk of court in vacation is not void, by reason of the failure of the corporate officer to file with the clerk some evidence of his authority to execute the power of attorney. It is true that if it should turn out that authority did not exist, the judgment would be void, not because the proof of authority is not filed with the clerk, but because of the absence of authority. Snyder Bros. *v.* Bailey, 165 Ill. 447, 46 N. E. 452.

Equitable Relief against Judgments by Confession.—There is no doubt of the equitable power of a court of equity to vacate a judgment by confession, upon proper application, on the ground of fraud. Warwick *v.* Petty, 44 N. J. L. 542; White *v.* Williams, 1 Paige (N. Y.) 502; Hagy *v.* Poike, 160 Pa. St. 522; Kohn *v.* Meyer, 19 S. Car. 197; Pirie *v.* Hughes, 43 Wis. 531.

But as was held in the principal case alleged fraud must be established either by direct proof or by clearly proved facts sufficient to warrant a presumption of its existence. It is not enough to charge fraud and prove in support thereof slight circumstances of suspicion only. Hagy *v.* Poike, 160 Pa. St. 522.